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in the

Supreme Court

of the

United States

October Term, 1984

No. 84-

DOUGLAS CHARLES DuFRESNE,
Petitioner,

vs.

BENJAMIN BAER, Chairman, United States Parole Commission, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the prohibition contained in the *ex post facto* clause of Article One, Section Nine of the United States Constitution applies to the parole guidelines of the United States Parole Commission, where different parole guidelines were adopted after a crime had been committed and were retrospectively applied to the detriment of the offender?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Douglas Charles DuFresne (pronounced Due-Frain), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered October 29, 1984; Petition for Rehearing before the original panel denied November 30, 1984.

OPINIONS BELOW

The Order of the Magistrate of the United States District Court for the Northern District of Florida, dated February 24, 1982, is set forth in the Appendix at page App. 1. The Magistrate's Order granted the Petitioner's Application for Writ of Habeas Corpus by conclusively finding that the United States Parole Commission, through the retrospective application of its parole guidelines in the Petitioner's case, had violated the Constitutional prohibition against *ex post facto* laws[1].

The Order and Memorandum Decision of the Judge of the United States District Court for the Northern District of Florida, dated August 4, 1982, is set forth in the Appendix at page App. 7. This Order reversed the previous Order of the Magistrate by concluding that the United States Parole Commission's guidelines cannot violate the *ex post facto* clause, even if applied retrospectively, and remanded the case to the Magistrate with directions to enter an Order dismissing with prejudice the Petitioner's Application for Writ of Habeas Corpus.

[1]United States Constitution Article One, Section Nine, Clause Three.

The Order and Judgment of the Magistrate of the United States District Court for the Northern District of Florida, dated August 9, 1982, is set forth in the Appendix at page App. 18-19. This Magistrate's Order, in compliance with the District Court Judge's Order, dismissed with prejudice the Petitioner's Application for Writ of Habeas Corpus.

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the Order of dismissal *(DuFresne v. Baer* 744 F.2d 1543 (11th Cir. 1984) is set forth in the Appendix at page App. 20.

JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit was entered on October 29, 1984. A timely Petition for Rehearing was denied on November 30, 1984 and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition contained in the *ex post facto* clause of Article One, Section Nine of the United States Constitution applies to the parole guidelines of the United States Parole Commission, where different parole guidelines were adopted after a crime had been committed and were retrospectively applied to the detriment of the offender?

CONSTITUTIONAL PROVISIONS INVOLVED

Article One, Section Nine, Clause Three of the Constitution of the United States:

"(n)o...ex post facto law shall be passed."

STATEMENT OF THE CASE

The Petitioner, Douglas Charles DuFresne, was formerly a senior pilot for Pan American Airlines, regularly flying commercial jetliners on overseas routes which included stopovers at Tehran, Iran. During the period of time when civil unrest and opposition to the Shah began to destabilize the economy of that country, the Petitioner arranged to personally import eight (8) pounds of raw opium into the United States from Iran. Given the courtesy which United States Customs extended to a senior Pan Am pilot, this "mule with wings" simply carried these drugs through customs in an unchecked valise. In 1979 a federal grand jury in the Western District of Texas indicted the Petitioner on three (3) counts for Conspiracy To Import Opium, Possession With Intent To Distribute Opium, and Conspiracy To Import Cocaine[2]. The Indictment correctly alleged that the Petitioner had committed these acts during a one (1) year period from March of 1978 to March of 1979.

Pursuant to a plea agreement, the Petitioner pled guilty to the third count of the Indictment on September 17, 1979, and on the government's motion the District Court then dismissed the first two (2) counts of the Indictment. The Petitioner was given an eight (8) year prison sentence, originally structured under 18 U.S.C. 4205(a), which meant that the Petitioner would become eligible for parole only after serving one-third (1/3) of his eight (8) year term[3]. However, on January 14, 1980 the

[2]United States v. DuFresne, et al., No. SA-79-CF-72 (W.D. Tex.).
[3]18 U.S.C. § 4205(a) (1982) provides in pertinent part:

> "Whenever confined and serving a definite term or terms of more that one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years..."

sentencing Court granted the Petitioner's Motion[4] to modify the sentence and structured it under 18 U.S.C. 4205(b)(2), which meant that the Petitioner became eligible for parole at any time at the discretion of the United States Parole Commission[5].

The Petitioner was given his initial parole hearing on May 21, 1980 at the Federal Prison Camp, Eglin Air Force Base, Florida. However, between the time of the offense behavior (March 1978 - March 1979) and the date of this initial parole hearing (May 21, 1980) the United States Parole Commission had changed both the parole guideline rating as well as the very basis on which the Petitioner's drug offense would be classified.[6]

At the time of the Petitioner's offense behavior, drug offenses were rated on the basis of the street value of the drugs possessed, ascertained by either the actual street sales price or, if no sale had taken place, a theoretical street sales price as determined by the Drug Enforcement Administration. Thus, under the parole guidelines in effect at the time of the crime, since the Petitioner's drugs had a street value of less than $100,000.00, his crime would have been classified in the "Very High" offense severity rating. This "Very High" offense severity rating, when combined with the Petitioner's first offender salient factor score of eleven (11), yielded a parole guideline range specifying incarceration for a

[4]Per Federal Rules of Criminal Procedure Rule 35.

[5]18 U.S.C. §4205(b)(2) (1982) provides in pertinent part:

> "Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine."

[6]44 Federal Register 26540-48 (May 4, 1979), guideline rating effective June 4, 1979.

term of between twenty-six to thirty-six months (26-36 months).

However, by the time of the Petitioner's initial parole hearing (May 21, 1980) the new parole guidelines effective June 4, 1979 had changed the basis by which drug offenses were to be evaluated. This new basis considers only the quanity and purity of the drugs possessed and the possessor's interest therein (i.e., whether managerial or non-managerial, proprietary or nonproprietary). Under these newly promulgated parole guidelines, the severity rating of the Petitioner's offense behavior was escalated to the "Greatest I" category, a severity rating only surpassed by the "Greatest II" rating reserved for the most heinous crimes, such as premeditated murder and air piracy.[7] This was accomplished by finding that the Petitioner had possessed a managerial interest in more that fifty (50) grams of 100% pure opiate, with no regard to the street value of the drugs whatsoever. Per the newly promulgated parole guidelines, this "Greatest I" offense severity rating, combined with the Petitioner's salient factor score of eleven (11), yielded a parole guideline range which specified incarceration for a term of between forty to fifty-two months (40-52 months). The United States Parole Commission, acting through the Southeast Regional Commissioner, originally set the Petitioner's required incarcerated term at fifty-two (52) months, a decision later modified to a presumptive parole after required service of forty-six (46) months.

The Petitioner first exhausted his administrative remedies by both Regional and then National Parole Appeals. The National Parole Appeals Board affirmed the Regional Commissioner's decision and the Petitioner thereupon sought habeas corpus relief in the United States District Court for the Northern District of Florida.

[7]See 28 C.F.R. 2.20 (1979).

The Petitioner's sole complaint was that the United States Parole Commission, by applying substantially different parole guidelines promulgated after the dates of the offense behavior, had retroactively enhanced the punishment for his crime, thereby violating the *ex post facto* prohibition of Article One, Section Nine, Clause Three, of the United States Constitution. In his application for habeas corpus relief, the Petitioner sought an Order requiring the United States Parole Commission to give him a presumptive parole date within the time frame specified by the guidelines which were in effect at the time the crime was committed.

All parties originally consented to the trial of the case before a U. S. Magistrate.[8] The Magistrate agreed with the Petitioner and granted the relief requested.[9] On appeal, the District Court Judge reversed, concluding that the United States Parole Commission's guidelines cannot violate the *ex post facto* clause, even if applied retrospectively, and remanded the case to the Magistrate with directions to enter an Order dismissing the case with prejudice.[10] The Magistrate so complied[11] and on appeal the United States Court of Appeals for the Eleventh Circuit affirmed the Order of dismissal.[12] A timely Petition for Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on November 30, 1984.

[8]See 28 U.S.C. 636(c) (1982).

[9]Magistrate's Order set forth in the Appendix at page App. 1.

[10]District Court Judge's Order set forth in the Appendix at page App. 7.

[11]Magistrate's Order and Judgment set forth in the Appendix at page App. 18-19.

[12]DuFresne v. Baer, 744 F.2d 1543 (11th Cir. 1984) set forth in the Appendix at page App. 20.

REASONS FOR GRANTING THE WRIT

I.
THE VARIOUS UNITED STATES COURTS OF APPEAL ARE CURRENTLY IN DIRECT CONFLICT OVER THE SOLE ISSUE WHICH THIS CASE PRESENTS, TO-WIT: THE APPLICATION OF THE EX POST FACTO CLAUSE TO THE UNITED STATES PAROLE COMMISSION'S GUIDELINES.

The Petitioner, formerly a senior pilot for Pan American Airlines, knows more than most the vagaries and varieties of geography. His case history, in fact, is a testimonial to his travelling nature. He walked the drugs through Customs in one region of this country (New York), was indicted in another region (Texas), and incarcerated in yet another region (Florida). Yet, at least in this last respect,his case is not unusual, for many a federal prisioner is currently incarcerated in what has been classified as an appropriate penal institution albeit far from the geographic place in the United States where the crime occurred or the conviction was handed down. It is this very mobility, the easy and continuous flow of federal prisoners from one state or region to another, which makes the current conflict between the various United States Courts of Appeal all the more untenable, for institutional location is presently the single most determinative factor when seeking federal habeas corpus relief for the claimed *ex post facto* application of United States Parole Commission's guidelines. Literally, were the Petitioner to have been incarcerated in a different Federal Prison Camp (e.g. Allenwood Federal Prison Camp, Montgomery, Pennsylvania, where an appeal would have gone before the Third Circuit Court of Appeals), seeking this writ in his case would have been unnecessary. This anomaly of conflict between the various United States Courts of Appeal is one which only the Supreme Court can rectify. The present disparity of

treatment on a purely geographical basis is clear, substantial, and wholly unwarranted.

The central and controlling issue may be simply stated: Do the United States Parole Commission's Guidelines have the force and effect of law, such that a retrospective application of them may constitute a violation of the *ex post facto* clause? The United States Courts of Appeal for the Third, Eighth, and District of Columbia Circuits have answered this question in the affirmative.[13] Meanwhile, the Second, Sixth, Seventh, Ninth and (with the case at bar) Eleventh Circuits have now stated that United States Parole Commission's Guidelines do not and cannot have the force and effect of law.[14] These two lines of cases are in direct and irreconcilable conflict with each other. Federal prisoners in some areas of the United States are accorded the full protection of the *ex post facto* clause against retrospective application of the United States Parole Commission's guidelines which have a detrimental impact upon them, while in other geographic areas identically situated federal prisoners are told that these same guidelines are merely discretionary and therefore are not "laws" within the province and proscription of the *ex post facto* clause. Only a decision by this Honorable Court can resolve the conflict and assure uniformity throughout the entire United States.

The current conflict between the various Circuits is further aggravated by the fact that oftentimes a single federal prisoner is moved through a series of facilities as

[13] *United States v. Ferri*, 625 F.2d 325 (3rd Cir. 1981); *Geraghty v. U. S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978); *Richardson v. U. S. Parole Commission*, 729 F.2d 1154 (8th Cir. 1984); *Pickus v. U. S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

[14] *Shephard v. Taylor*, 556 F.2d 648 2d Cir. 1977); *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977); *Zeidman v. U. S. Parole Commission*, 593 F.2d 806 (7th Cir. 1979); *Rifai v. U. S. Parole Commission*, 586 F.2d 695 (9th Cir. 1978); and now *DuFresne v. Baer*, 744 F.2d 1543 (11th Cir. 1984).

his custody classification, behavior, and immediately pending parole may warrant. A single prisoner may, for example, begin his incarcerated term in a Federal Correctional Institution, be transferred to a Federal Prison Camp, and finally be placed in a Federal Community Treatment Center immediately prior to his release on parole. Currently, if these transfers between facilities cross Circuit lines, the same prisoner on the same issue may have a valid habeas corpus claim on some days but not others merely depending upon his physical location. Moreover, it frequently happens that a federal prisoner is moved from his regularly assigned institution to a new situs where he is to be questioned by authorities or testify in a court proceeding. Again, his right to habeas corpus relief may currently be predicted upon just such a temporary transfer.

In 1976, when Congress passed the Parole Commission and Reorganization Act,[15] the United States Parole Commission was instructed to carry out a "national parole policy"[16] and to promulgate guidelines for the express purpose of promoting "a more consistent exercise of discretion".[17] From the outset the clear intent of Congress was to eliminate the unwarranted disparity between parole considerations involving similarly situated federal prisoners. Yet, that clear intent is presently being thwarted in certain cases, such as that of the Petitioner, where the conflict between the various Circuit Courts of Appeal has created a two-tone patchwork quilt of disparity across a map of the United States.

In the past, this Honorable Court has not hesitated to remove uncertainty and eliminate unwarranted disparity where a clear conflict has existed amongst the

[15]Act of March 15, 1976, Pub. L. No. 94-233, 1976 U.S. Code Cong. & Ad. News (90 Stat.) 219 (codified in various sections of 18 U.S.C. (1976)).

[16]18 U.S.C. 4203(a)(1) (1982).

[17]28 C.F.R. 2.20 (1979).

United States Courts of Appeal for the various Circuits. The present situation warrants the same remedial attention.

II

ONLY THE SUPREME COURT IS QUALIFIED TO FINALLY DETERMINE WHETHER THE UNITED STATES PAROLE COMMISSION'S GUIDELINES ARE "LAWS" WITHIN THE SCOPE OF THE EX POST FACTO CLAUSE.

The various United States Courts of Appeal which have considered *ex post facto* claims involving retrospective use of later promulgated United States Parole Commission guidelines have been in unanimous agreement that the determinative question is whether or not these guidelines have the force and effect of law.

The character of law in our modern bureaucratic nation is not always easy to ascertain. As Chief Judge Boyle of Rhode Island wrote only this last year:

> "Rights are not only subject to specific acts of the legislature, but also to those of its delegates or alter egos, in the persons of administrative bodies. Today law is generally the law which may impinge most directly upon individual rights."[18]

Perhaps this is not an unexpected modern dilemma for this Honorable Court recognized the same issue over fifty (50) years ago when discussing the *ex post facto* clause as related to "laws, whatever their form".[19] Thus, while it is true that no legislature promulgated the present parole

[18] *Lerner v. Gill*, 580 F. Supp. 1056 at 1060 (D.R.I. 1984).
[19] *Beazell v. Ohio*, 269 U.S. 167 (1925).

guidelines, certain Circuit Courts of Appeal have held them to be "laws" and as such, capable of working to the detriment of those persons against whom they were retrospectivly applied.

At the core of evaluating the United States Parole Commission's guidelines as possible "laws", there lies the question of discretion. In the case at bar, the Eleventh Circuit Court emphasized the retained discretion of the United States Parole Commission in concluding that the guidelines were not law, "rather, they are stated policy rules that show how agency discretion is likely to be exercised".[20] The court then went on to quote the Sixth Circuit's similar conclusion in the case of *Ruip v. United States*, 555 F.2d at 1335:

> "These guidelines are not law, but guideposts which assist the Parole Commission...in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not filed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines."[21]

However, other Courts have been equally clear in finding that the guidelines have fettered discretionary power such that parole determinations have not remained discretionary acts. To quote from the Third Circuit Court in the case of *Geraghty v. U. S. Parole Commission*, 579 F.2d at 267:

> "The freedom of the Commission to grant parole prior to the customary release date is constrained...It thus appears that the 'channel for discretion' provided by the guidelines is in fact an unyielding conduit."[22]

[20]Appendix, at page App. 35.
[21]Appendix, at page App. 36.
[22]*GERAGHTY, supra.*

This same sentiment was expressed by the District of Columbia Circuit Court over a dozen years ago:

> "...the rules which define parole selection criteria, new and old, are substantive agency action, for they define a fairly tight framework to circumscribe the Board's statutorily broad power...they are self imposed controls over the manner and circumstances in which the agency will exercise its plenary power. They have the effect of law..."[23]

As can be seen from even these few quotations the nebulous nature of "laws", as applied to agency action such as the United States Parole Commission's guidelines, is such that only this Honorable Court is qualified to provide a determinative answer, thereby terminating the current disparity between the treatment of federal prisoners in the various Circuits.

III

THE ISSUE AT BAR IS NOT MOOT AS TO THE PETITIONER

On April 10, 1982, the Petitioner was paroled "under protest" by the United States Parole Commission in compliance with the Magistrate's Order of February 24, 1982.[24] However, on August 4, 1982, the District Court Judge reversed the Magistrate,[25] a decision which would have mandated additional incarcerated service by the Petitioner. The Petitioner thereupon filed a Motion To Stay Pending Appeal, which was granted by the Magistrate on September 10, 1982. The Petitioner was released on bail September 17, 1982 and has remained on

[23] *PICKUS, supra,* 507 F.2d at 1113, footnote 13.
[24] Appendix, at page App. 1.
[25] Appendix, at page App. 7.

bail to the present date.

In granting Certiorari, this Honorable Court would be determining whether or not the Petitioner need serve the additional term of incarcerated service representing the difference between the guidelines in effect at the time the Petitioner committed the offense behavior and those differing and more stringent guidelines in effect at the time of the Petitioner's parole hearing.

CONCLUSION

This Honorable Court is the only proper forum for resolving the current direct conflict between the various United States Courts of Appeal as concerns the application of the *ex post facto* clause to the United States Parole Commission's guidelines. The current disparity between federal prisoners, based solely upon the geographic location of their incarceration facility, is both untenable and unwarranted, as is the ludicrous present scenario wherein even a single prisoner may at various times and locales be entitled to habeas corpus relief, a right then subject to termination when he crosses a state line in an involuntary transfer between federal facilities. Only a decision by this Honorable Court can finally determine whether the United States Parole Commission's guidelines are "laws", a determination upon which any *ex post facto* consideration must hinge.

The Supreme Court should grant this Petition for Writ of Certiorari in order to satisfy the urgent need to end such disparity between the treatment of federal prisoners as concerns their parole determinations under the current decisions of the various United States Courts of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U. S. Mail this 19th day of February 1985, to Rockne Chickinell, Attorney for the U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland, 20815 and to Samuel A. Alter, Jr., Assistant U.S. Attorney, 307 U.S. Courthouse, 100 North Palafox Street, Pensacola, Florida 32501.

ALLEN R. SMITH

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner,

vs. PCA 81-0541

CECIL C. McCALL, Chairman
United States Parole Commission,
et al.,

Respondents.

ORDER

On January 18, 1982, this habeas corpus matter was remanded to the United States Parole Commission to more specifically inquire into, and ascertain, the monetary amounts involved in the petitioner's offense. The Parole Commission was to apply these findings to its 1977 parole guidelines to determine whether the petitioner's offense behavior severity should be classified as "Very High" or "Greatest" under those regulations. Based on the additional information furnished by the Parole Commission, the merits of the petitioner's *ex post facto* claim would then be, and are now, decided by the court.

I. RESPONDENTS' INITIAL REPORT

In their initial report to the court (document 17), the respondents inexplicably notified the court for the first time of action taken in the petitioner's case by the Parole Commission on September 25, 1981, one day after the respondents filed their response to the court's show cause order of August 27, 1981 (document 2). Evidently

prompted by the filing of the petition for writ of habeas corpus, the Parole Commission completed another review of the petitioner's offense behavior severity rating and issued a notice action clarifying its basis for the earlier decision to rate the offense as "Greatest I": "Your offense behavior has been rated as Greatest I severity because it involved the equivalent of 260 grams of pure heroin with mangerial interest." Respondents' Exhibit L.

Utilizing chemical analysis information from a laboratory report prepared for the prosecution of the petitioner's case as well as for his codefendents' cases, the Parole Commission determination of 260 grams of heroin, more correctly characterized as morphine, was reached by multiplying the net weight of opium involved, 3,663 grams, by the percentage of pure morphine found contained in the opium, 7.1 percent. Respondents' Exhibit M. The respondents posited in their first report to the court that this 260 gram figure not only results in a "Greatest I" severity rating under the 1980 parole guidelines, but also a "Greatest" severity rating under the 1977 parole guidelines, and therefore no *ex post facto* violation exists. To arrive at this result, the respondents used their "Street Value Chart," which is applied to rate various drug offenses under the 1980 parole guidelines when quantity/purity information is unavailable.

The respondents' apparent reasoning is predicated upon an analysis using the "Street Value Chart" as follows: the 3,663 grams of opium contained 260 grams of pure morphine; under the 1980 parole guidelines, 28 C.F.R. § 2.20 (1980), an offense involving more than 50 grams of pure herion (morphine) is rated as "Greatest I" severity; the corresponding "street value" for opiates in the "Greatest I" severity as found in the "Street Value Chart" is more than $100,000; therefore, the street value of 260 grams is *presumed* to be more than $100,000, which under the monetary amount standards of the 1977 parole

guidelines would place the petitioner's offense in the "Greatest" severity category. The respondents' most recent report to the court indicates that they have now abandoned, and properly so, using "presumed" street values derived from the 1980 parole guidelines to enable entrance into the 1977 parole guidelines at an equivalent severity rating.

The only significant information gleaned from the respondents' report is that the specific amount of opium involved in the petitioner's case is 3,663 grams, vice the court's previous conversion of the estimated eight (8) pounds involved to 3,628.72 grams.

II. RESPONDENTS' FINAL REPORTS AND REDETERMINATION

When the court remanded this case to the Parole Commission, the main concern requiring clarification was the monetary amount involved in the offense of conspiracy to import cocaine, the charge for which the petitioner was convicted. The court's previous order noted that ambiguous information in the record, if substantiated, could result in a monetary amount in excess of $100,000, rendering the petitioner's *ex post facto* claim unmeritorious. However, it is evident from the respondents' reports, which offer no new or additional evidence, that the $35,000 figure attributable to the cocaine offense in the original record is the only ascertainable and substantiated monetary amount involved in the cocaine case.

Because of the conjectual manner in which the Parole Commission arrived at its final assessment of the monetary amount involved in the opium aspect of this case, the court must conclude that this action was arbitrary and unauthorized, constituting an abuse of discretion and requiring reversal. As the court's previous

order exhaustively set out, the record sufficiently established several methods through which the value of the opium could be computed by the Parole Commission. The court noted that the method which produces the maximum value for the opium results in a value of $34,865.07. Nevertheless, the Parole Commission has "converted" the 3,663 grams of opium which the petitioner imported and possessed into 260 grams of pure heroin, and then has theoretically diluted that heroin to 164 ounces of 6.75 percent heroin having a purchase value of $114,800.00. Using this extrapolated value, the Parole Commission has determined that under the 1977 parole guidelines the petitioner's offense behavior severity would be "Greatest" severity, resulting the respondents assert in no *ex post facto* violation.

Because of the speculative nature of this attempt by the Parole Commission to obtain the same final decision upon remand as they did originally, the court must conclude that the respondents' actions are arbitrary, especially in light of previously available substantial information as to the value of the opium itself and in the absence of evidence to rebut those valuations.

As previously noted, the amount of opium seized from the petitioner's codefendants Smith and Ferguson was 3,663 grams. The court's previous order noted:

> The amount of opium in Smith's case was 2,500.73 which converts to 5.51 pounds. The value of Smith's opium is set at a total value of $22,500.00, which computes to a cost per gram of $9.00 and a cost per pound of $4,083.48.

Dufresne v. McCall, No. PCA 81-0541 at 11 (N.D. Fla. Jan. 18, 1982) *(Dufresne I)*. This valuation, as compared to the other computation methods discussed in the previous order, results in the highest value for the opium and

significantly was obtained from the Parole Commission's notice of action in Smith's case. Smith had obtained the amount of opium assessed to him from the petitioner.

At $9.00 per gram, 3,663 grams of opium is worth $32,967.00. The monetary amount involved, then, in the petitioner's case is as follows:

Opium purchase	$ 2,177.23
Opium value	32,967.00
Cocaine conspiracy	35,000.00
TOTAL VALUE	$ 70,144.23

Thus, under the 1977 parole guidelines, the petitioner's severity rating is "Very High" with a range of time to be served of 26 to 36 months. The respondents' setting of the petitioner's parole release date, therefore, violates the *Ex Post Facto* Clause, and this case shall again be remanded to the respondents to correct this constitutional error.

Upon remand, the respondents shall exercise their discretion in establishing the petitioner's parole release date pursuant to the 1977 parole guidelines, using the 26 to 36 month range of time to be served for persons with a severity rating of "Very High" and a salient factor score of eleven (11), while at the same time considering such mitigating and aggravating circumstances predicated upon a rational basis as supported in the record. *See* 28 C.F.R. §§ 2.18, 2.19, 2.20(c) (1977 and 1980). As noted in the court's previous order, however, multiple offense aggravation at this stage would be inappropriate. *Dufrense I* at 13.

Acordingly, it is now

ORDERED:

1. The writ of habeas corpus should be, and the same is hereby, issued, and this case is remanded one final time to the United States Parole Commission.

2. The respondents shall have fourteen (14) days from the date hereof in which to exercise their discretion and, consistent with this order, establish the petitioner's parole release date pursuant to the 1977 parole guidelines. The respondents shall, within the same period, also file notice to the court specifying the Parole Commission's final decision and rationale.

DONE AND ORDERED in Chambers at Pensacola, Florida, this 24th day of February, 1982.

ROBERT L. CRONGEYER, JR.
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner-Appellee,

vs. PCA 81-0541

CECIL C. McCALL, Chairman
United States Parole Commission,
et al.,

Respondents-Appellants.

_____ /

ORDER

Pursuant to and in accordance with memorandum decision of this date, it is

ORDERED as follows:

1. The magistrate's orders appealed from in this case are reversed.

2. This case is remanded to the magistrate with directions to enter an order dismissing with prejudice petitioner's application for writ of habeas corpus.

DONE AND ORDERED this 4th day of August, 1982.

_____
WINSTON E. ARNOW, Senior Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner-Appellee,

vs. PCA 81-0541

CECIL C. McCALL, Chairman
United States Parole Commission,
et al.,

Respondents-Appellants.
_____ /

MEMORANDUM DECISION

Before this court is an appeal by respondents from orders entered by the magistrate. The magistrate had before him, on a petition for writ of habeas corpus, a contention by petitioner that the respondents improperly and unlawfully established the petitioner's parole release date by erroneously applying parole release criteria enumerated in the United States Parole and Probation Commission Regulations 28 C.F.R. Part 2, promulgated May 1979 and amended in January 1980. Upon filing of notice of consent by the respective parties, the matter was referred to the magistrate for the conduct of all proceedings.

The magistrate concluded the respondents were in error in applying guidelines that became effective subsequent to the commission of the offenses for which petitioner was convicted and subsequent to his sentence. Under the magistrate's reasoning the guidelines have the force and effect of law and are subject to ex post facto

prohibition contained in the constitution because, under them, a prisoner's parole eligibility could be substantially diminished or eliminated by use of the parole release criteria or guidelines.

In support of this conclusion the magistrate cited *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981) and *Graham v. United States Parole Commission*, 629 F.2d 1040 (5th Cir. 1980). He also cited *United States v. Ferri*, 652 F.2d 325, 327 (3rd Cir. 1981), saying that in it the third circuit summarized the ex post facto analysis enunciated in *Weaver* and found applicability of the ex post facto prohibition to the parole guidelines of the United States Parole Commission.

Weaver involved a Florida statute that reduced the gain time for good conduct of a prisoner. The court held the statute on its face reduces the number of monthly gain time credits available to an inmate who abided by the rules and adequately performed his tasks. The court concluded that such was unconstitutional as an ex post facto law as applied to a person whose crime was committed before the statutes enactment.

The instant case involves no such statute or regulation mandating disadvantage. Involved instead are guidelines for the exercise of the discretion by the commission - discretion it had when petitioner's crime was committed and he was sentenced and discretion it had both before and after the adoption of the guidelines here involved.

Nor in *Graham* were these sentencing guidelines involved. In that case, under the regulation in effect at Graham's sentencing, the commission was free to act respecting parole in the absence of clearly exceptional circumstances. Under regulation adopted after sentencing a presumptive parole release date could not be

advanced "except under clearly exceptional circumstances". The court concluded that, depending upon what meaning the commission imparted to the term "clearly exceptional circumstances", the regulation might significantly restrict a prisoner's parole eligibility. It remanded to the district court for it to make determination in that respect. Again, there is not involved here a regulation or guideline that, as interpreted by the commission, might mandate disadvantage. There are involved here only sentencing guidelines in which the commission has and retains discretion.

From *Stroud v. United States Parole Commission,* 668 F.2d 843 (5th Cir. 1982), at page 847:

> Nor do we find a violation of *ex post facto* prohibitions by the Commission's use of convictions occurring prior to 1976, the date the parole guidelines became effective. There is no *ex post facto* violation in the retroactive application of the guidelines. *See Graham v. U.S Parole Commission,* 629 F.2d 1040, 1043 (5th Cir. 1980). Under both the statute and regulations, the Commission may consider a prisoner's prior criminal record and may determine that the prisoner serve a sentence above those in the guidelines. 18 U.S.C. §4206, 18 U.S.C. §4207; 28 C.F.R. §2.19; 28 C.F.R. §2.20.

In *Ferri,* a prisoner contended, among other things that the application of guidelines adopted after his sentencing violated the ex post facto clause. The circuit court affirmed the district court's dismissal of the petition; Matthews filed petition for certiorari with the Supreme Court. The Supreme Court vacated the circuit court's affirmance and remanded for further consideration in the light of *Weaver.*

The petitioner relied on *Geraghty v. U.S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978). The *Ferri* 3rd Circuit Court felt the reasoning in *Weaver* strengthened the views expressed in the earlier case of *Geraghty*. It had there concluded that the net effect of the guidelines, if mechanically applied, might have ex post facto effect, and remanded to the district court for determination whether the commission in fact exercised discretion in applying the new guidelines. In *Ferri*, the case was remanded to the district court for consideration of the ex post facto contentions presented in the light of *Weaver* and *Geraghty*.

In what is to this court somewhat curious reasoning, the *Geraghty* court said that since the commission departed from the guidelines only in something like 8.7% of the cases, the guidelines were in actuality an "unyielding conduit".

Obviously, the guidelines were not an "unyielding conduit" in those cases where the commission went beyond them. The petitioner in *Stroud* also presented a mechanical contention.The court gave it short shrift. It agreed with the magistrate that petitioner's own case exemplified that the procedure was not purely mechanical because, in his case, a decision outside the guidelines had been made.

It appears the vast majority, though not all, of the commission's parole decisions fall within the guidelines. The promotion of consistency was one of the purposes of their adoption; it is understandable that the majority of the decisions fall within the guidelines. It still remains that the guidelines themselves are not mechanically applied, as *Stroud* points out, because the commission in some cases does indeed go beyond them.

In *Warren v. U.S. Parole Commission*, 659 F.2d 183

(D.C. Cir. 1981) there was involved the question of violation of the ex post facto requirements by subsequently adopted guidelines for reparole.

The court, saying that "guidelines for reparole, like the guidelines for parole, however, are just that - guidelines", held that the existence of the guidelines does not increase the prisoner's punishment. As it pointed out, the parole commission may choose not to follow the guidelines or do other things within its discretion. Because of such, it cannot be said that the guidelines themselves disadvantage a prisoner. The decision pointed out that a change merely in the manner in which the commission exercises its discretion cannot offend the ex post facto clause and it went ahead to point out that:

> The mere fact that the Parole Commission's mercy is now channeled, structured and rationalized by a formal system of guidelines does not worsen Warren's position. He was sentenced to be held at their discretion. He is being held at their discretion. Such are the wages of crime.
> 659 F.2d at 196.

The court, accordingly, held that the application of the parole commission's reparole guidelines to *Warren* does not offend the ex post facto clause of the constitution. It noted that it is joined in that conclusion by all circuits that have considered the question save one. It cited cases in the second, sixth, seventh and ninth circuits that agree with that. It pointed out that in *Geraghty* the third circuit ruled otherwise.

Warren, in referring to second, sixth, seventh and ninth circuits as rejecting similar claims, cited the following cases:

Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977) (dictum):

Ruip v. United States, 555 F.2d 1331 (6th Cir. 1977);

Zeidman v. U.S. Parole Commission, 593 F.2d 806 (7th Cir. 1979);

Rifai v. U.S. Parole Commission, 586 F.2d 695 (9th Cir. 1978).

Other cases holding that the provision against ex post facto legislation does not apply to these parole commission guidelines include *Kirby v. United States*, 463 F.Supp. 703 (1979), *Richards v. Crawford*, 437 F.Supp. 453 (1977) and *Smaldone v. United States*, 458 F.Supp. 1000 (1978).

The guidelines here involved are found in Title 28, §2.20, Code of Federal Regulations. As they existed as applied by the commission in this case, they read in pertinent part as follows:

> (a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.
>
> (b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good

institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

20 C.F.R. §2.20 (1979 and 1980).

As is apparent from them, they were adopted to establish a national paroling policy, promote a more consistent exercise of discretion and enable thorough and more equitable decision making without removing individual case consideration. The guidelines point out the time ranges are merely guidelines and that decisions outside of them may be rendered when circumstances warrant.

As this court understands it, the reasoning of those cases denying ex post facto application of these guidelines rests in the fact that both under the statute authorizing their adoption, and under them, they are indeed guidelines - nothing more and nothing less. The commission may deviate from them and it is not bound

by them. Under them the commission has the discretionary right to make parole decisions outside them and it does so.

In *Portley v. Grossman,* 444 U.S. 1311, 62 L.Ed. 2d 723, 100 S.Ct. 714 (1980), (in chambers opinion of Justice Rehnquist) the opinion stated the reparole consideration guidelines, 28 C.R.F. §2.21 (1978) operated only to provide a frame work for the commission's exercise of its statutory discretion. Citing *Dobbert v. Florida*, 432 U.S. 282, 53 L.Ed. 2d 344, 97 S.Ct. 2290 (1977) Justice Rehnquist concluded the change in the guidelines assisting the commission in the exercise of its discretion is in the nature of a procedural change found permissible in *Dobbert.*

Under that reasoning, the guidelines here involved present a permissible procedural change. The petitioner cannot be held in confinement beyond the sentence imposed on him and at the time of his sentence release on parole earlier than its expiration date was in the commission's discretion. Like the reparole guidelines, these guidelines neither deprive petitioner of any pre-existing right nor enhance the sentence imposed.

The court disagrees with the magistrate's conclusion that, since a prisoner's parole eligibility could be substantially diminished or eliminated by the use of parole criteria or guidelines, such presents ex post facto problems. To this court, a law or regulation having the force of law does not have ex post facto effect unless it would - not could - disadvantage the offender affected by it.

As the commission points out, Congress intended that the commission should constantly monitor and revise its guidelines when appropriate. To hold that every time it does so it runs the risk of ex post facto violation, in

the exercise of the discretion vested in it by the Congress, strains beyond reason the ex post facto requirement of the constitution. The congress intended to vest discretion in the commission, and, having that discretion, its guidelines cannot have ex post facto effect.

On appeal the question is also raised whether the magistrate erred in finding the commission acted arbitrarily and capriciously in relying on hearsay information to render the same release decision in response to his January 18, 1982 order. The matter was remanded by the magistrate to the U.S. Parole Commission to inquire more specifically into and ascertain the monetary amounts involved in the petitioner's offense. If there was a monetary amount in excess of $100,000 then the petitioner's ex post facto claim in this case would be unmeritorius.

In apparent response the commission presented before the magistrate affidavit of its agent supporting the conclusion that the opium involved was worth more than $100,000.

In the affidavit street values were used, which made its value much more than the values that had been previously assigned to it by the commission.

The magistrate, pointing out such constituted a departure from the first valuation method used, and saying that the manner in which it arrived at its final assessment was "conjectural", concluded that this was arbitrary unauthorized action constituting an abuse of discretion ad requiring reversal.

The magistrate erred in so holding. The commission had the right, under the law, to use hearsay information and had the right, under the law, to proceed on the street value evaluation for value purposes and it had the right

to proceed by affidavit as it did.

That such changed method of evaluation apparently came in response to the magistrate's ruling and in an endeavor to place beyond question the ex post facto problem does not establish that the action of the commission, which it was authorized to take, and which it took in an authorized manner, was arbitrary. To so hold fails to accord, as the commission points out, the deference that is due the commission and its finding.

On its review, this court concludes that the magistrate made reversible error in finding that the parole commission's retrospective application of its parole guidelines to petitioner's case violated the constitutional ban against ex post facto laws.

This court also concludes that the magistrate erred in finding the commission acted arbitrarily and capriciously to render its valued decision in response to his January 18, 1982 order.

Order will be entered reversing the magistrate's orders appealed from in this case with the case being remanded to the magistrate with directions to enter an order dismissing with prejudice petitioner's application for writ of habeas corpus.

DATED this 4 day of August, 1982.

WINSTON E. ARNOW, Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner,

vs. PCA 81-0541

CECIL C. McCALL, Chairman,
United States Parole
Commission, et al.,

Respondents.

_____ /

ORDER

This cause is before the court upon remand by the District Court directing entry of an order dismissing with prejudice petitioner's application for writ of habeas corpus. Accordingly, it is now

ORDERED:

1. The petition for habeas corpus is hereby denied.

2. The clerk of the court shall enter a judgment against petitioner on the merits and with prejudice.

DONE AND ORDERED in Chambers at Pensacola, Florida, this 9th day of August, 1982.

ROBERT L. CRONGEYER, JR.
United States Magistrate

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DOUGLAS CHARLES DuFRESNE,

Petitioner,

vs. PCA 81-0541

CECIL C. McCALL, Chairman,
United States Parole
Commission, et al.,

Respondent(s).

J U D G M E N T

Pursuant to and at the direction of the Court,

It is Ordered and Adjudged that the petitioner take nothing and that this petition be dismissed with prejudice/denied on the merits.

Dated at Pensacola, Florida, this 9th day of August, 1982.

MARVIN S. WAITS, CLERK

By: _____
Deputy Clerk

Douglas Charles DUFRESNE,
Petitioner-Appellant,

v.

Benjamin BAER, Chairman, U.S. Parole Commission, Et Al.,
Respondents-Appellees.

No. 82-5942.

United States Court of Appeals,
Eleventh Circuit.

Oct. 29, 1984.

Federal prisoner, who pled guilty to conspiracy to import cocaine, commenced habeas corpus proceedings, alleging that the United States Parole Commission fixed his presumptive parole release date using guidelines that violated the ex post facto clause of the Federal Constitution. The United States District Court for the Northern District of Florida, Winston E. Arnow, J., denied the relief, and prisoner appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that retrospective amendment of the federal parole guidelines upgrading the severity rating for conspiracy to import cocaine did not violate the ex post facto clause, since such amendment did not increase prisoner's punishment, and such guidelines did not have the force and effect of law.

Affirmed.

1. Constitutional Law ⇐ 199

An "ex post facto law" possesses three characteristics: it is a criminal or penal measure,

retrospective, and disadvantageous to the offender because it may impose greater punishment. U.S.C.A. Const. Art. 1, § 9, cl. 3.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐ 203

A law which is merely procedural and does not add to the quantum of punishment cannot violate the ex post facto clause even if it is applied retrospectively. U.S.C.A. Const., Art. 1, § 9, cl. 3.

3. Constitutional Law ⇐ 197

When subjecting a law to ex post facto scrutiny, courts should bear in mind the related aims of the ex post facto clause: providing fair notice of which acts will subject the perpetrator to criminal sanctions, and preventing vindictive criminal legislation. U.S.C.A. Const. Art. 1, § 9, cl. 3.

4. Constitutional Law ⇐ 197

The ex post facto clause operates to ensure that a citizen's fair notice as to what acts are criminal will not be changed after the citizen acts in reliance on that notice. U.S.C.A. Const. Art. 1, § 9, cl. 3.

5. Pardon and Parole ⇐ 42

Congress, in the Parole Commission and Reorganization Act, intended that the Parole Commission continue to refine both the criteria which are used in parole decision making and the means for obtaining the information used. 18 U.S.C.A. § 4202 et seq.

6. Constitutional Law ⇐ 203

Retrospective amendment of parole guidelines by the Federal Parole Commission, upgrading the severity rating for conspiracy to import cocaine, did not increase defendant's punishment and, thus, did not violate the ex post facto clause of the Federal Constitution. 18 U.S.C.A. §§ 4202 et seq., 4203(a)(1); U.S.C.A. Const. Art. 1, § 9, cl. 3.

7. Constitutional Law ⇐ 203

Parole guidelines of the Federal Parole Commission do not have the force and effect of law; thus, retrospective amendment of such guidelines by the Commission does not violate the ex post facto clause of the Federal Constitution. 18 U.S.C.A. §§ 4202 et seq., 4203(a)(1); U.S.C.A. Const. Art 1, § 9, cl. 3.

8. Pardon and Parole ⇐ 42, 53

Congress, in the Parole Commission and Reorganization Act, intended that the Parole Commission periodically amend the parole guidelines to reflect contemporary views concerning the seriousness of given crimes and parole recidivism. 18 U.S.C.A. §§ 4202 et seq., 4203(a)(1).

9. Pardon and Parole ⇐ 48

The standards for release on parole in the Parole Commission and Reorganization Act are not changed from prior law. 18 U.S.C.A. §§ 4202 et seq., 4206(a).

10. Pardon and Parole ⇐ 47, 53

The Federal Parole Commission may follow its parole guidelines, disregard them, or change them; parole remains an act of discretion. 18 U.S.C.A. §§ 4202 et

seq., 4203(a)(1), 4206(a).

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In these habeas corpus proceeding, the petitioner, a federal prisoner, alleges that the U.S. Parole Commission fixed his presumptive parole release date using guidelines that violated the ex post facto clause of article 1, section 9, of the Constitution. The district court denied relief. We affirm.

I.

The petitioner, Douglas Dufresne, was a senior pilot for Pan American Airlines. During the late 1970's he began trafficking in illicit drugs, at one point importing eight pounds of raw opium into the United States from Iran. In 1979 a federal grand jury in the Western District of Texas indicted petitioner in three counts for conspiracy to import opium, possession with intent to distribute opium, and conspiracy to import cocaine. The indictment alleged that petitioner committed these acts during the period from March 1978 to March 1979.

On September 17, 1979, petitioner pled guilty to the third count of the indictment,[1] conspiracy to import cocaine, and the district court sentenced him to a partially indeterminate eight-year prison sentence under

[1] On the government's motion, the court dismissed the first two counts of the indictment. *See* Fed.R.Crim.P. 48(a).

18 U.S.C. § 4205(a) (1982).[2] Under this sentence, petitioner would become eligible for parole at the discretion of the U.S. Parole Commission (the Commission) after serving one-third of this eight-year term. *Id.* On January 14, 1980, the court granted petitioner's Fed.R.Crim.P. 35 motion to modify sentence and made petitioner's sentence fully indeterminate under 18 U.S.C. § 4205(b)(2) (1982).[3] Petitioner thus became eligible for parole at any time, at the Commission's discretion.

The Commission, acting through the Commissioner in charge of the Southeast Region (regional Commissioner),[4] initially considered petitioner for parole four months later, in May. Following the recommendation of the two examiners who conducted

[2] 18 U.S.C. § 4205(a) (1982) provides in pertinent part:
Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years ....

[3] 18 U.S.C. § 4205(b)(2) (1982) provides in pertinent part:
Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may ... fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

[4] The nine-member U.S. Parole Commission has been structured as follows at all times relevant here: five members in addition to performing the duties assigned to the full Commission, e.g., promulgating guidelines, serve as regional Commissioners and make most of the initial parole decisions; three members, also in addition to performing the duties assigned to the full Commission, serve as the National Appeals Board which, *inter alia*, reviews the parole decisions of the regional Commissioners. *See generally*, 18 U.S.C. §§ 4202, 4203(c)(l), (4), 4204(a)(5) (1982).

petitioner's parole hearing and applying the Commission's parole guidelines, 28 C.F.R. § 2.20 (1979), the regional Commissioner gave petitioner a presumptive parole release date of fifty-two months. This meant that petitioner would be paroled in fifty-two months if he "substantially observed the rules of the institution" in which he was confined, *see* 18 U.S.C. § 4206(a) (1982); if he did not, the Commission could require him to serve more of his eight-year sentence.

In setting petitioner's presumptive release date, the regional Commissioner applied guidelines which focused upon the severity of the petitioner's offense and his parole prognosis. These parole guidelines classified the severity of his offense as "Greatest I," a severity rating surpassed only by the "Greatest II" rating given to crimes such as murder and piracy. The severity rating was high because at the time petitioner committed his crime he possessed a managerial interest in more than fifty grams of 100% pure opiate.[5] The guidelines gave petitioner a "very good" parole prognosis because his perfect eleven "salient factor score," calculated by weighing offender characteristics such as a history of criminal convictions, previous incarceration, and drug dependency, indicated that he would pose no risk to society if released. According to the guidelines, an inmate with an offense severity rating of "Greatest I" and a salient factor score of eleven was to serve a term somewhere between forty and fifty-two months. The regional Commissioner set petitioner's term at fifty-two

[5] Although petitioner pled to and was found guilty only of conspiracy to import cocaine, his possession of eight pounds of highly pure opium formed the basis for the severity rating. *See* 28 C.F.R. § 2.19 (1979). Petitioner does not question the Commission's consideration of this possession in determining the severity rating.

months.[6]

Petitioner appealed this decision to the Commission's National Appeals Board. He contended that the regional Commissioner's decision should have been based on the offense severity rating in effect at the time he committed his crime rather than the one currently in effect. The earlier offense rating, repealed in mid-1979,[7] would have assessed the seriousness of petitioner's crime on the basis of the street value of the drugs he possessed, not on the basis of the purity of those drugs and his managerial interest therein. Thus, because his drugs had a street value of less than $100,000, petitioner's crime would have been classisfied as "Very High," not "Greatest I." A "Very High" offense rating, combined with a salient factor score of eleven, would have called for petitioner to be incarcerated for a period between twenty-six to thirty-six months.

The National Appeals Board affirmed the regional Commissioner's decision, and petitioner, having exhausted his administrative remedies, brought these habeas corpus proceedings in the district court. Petitioner sought an order requiring the Commission to give him a presumptive parole date within the time frame specified in the guidelines in effect when he committed his crime. Petitioner's sole complaint was that the Commission, in applying the current guidelines, retroactively enhanced the punishment for this crime, thereby violating the ex post facto prohibition found in article 1, section 9, clause 3, of the Constitution. The

[6] The regional Commissioner could have set petitioner's release date above or below that indicated by the guidelines, however. *See infra* slip op. at p. 524 & note 16, at p. _____ & note 16. The Commissioner later accelerated petitioner's presumptive release date by six months for reasons unimportant to this appeal. Petitioner has served approximately 40 months of his sentence and is currently released on bail pending this appeal.

[7] 44 Fed.Reg. 26540-48 (May 4, 1979).

parties consented to the trial of the case before a U.S. magistrate. *See* 28 U.S.C. § 636(c) (1982). The magistrate agreed with petitioner and granted the relief he sought. The district court, on appeal, *id.*, reversed, concluding that the parole guidelines the Commission applied in petitioner's case neither deprived him of any pre-existing right nor enhanced his sentence; rather, they merely aided the Commission in the exercise of its decision making. Petitioner took this appeal from the district court's decision.

II.

[1, 2] The ex post facto clause at issue commands that "[n]o...ex post facto law shall be passed." U.S. Const. Art. I, § 9, cl. 3.[8] An ex post facto law possesses three characteristics: it is a criminal[9] or penal measure, retrospective and disavantageous to the offender because it may impose greater punishment. *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); *Dobbert v. Florida,* 432 U.S. 282, 292-93, 97 S.Ct. 2290, 2297-98 53 L.Ed.2d 344 (1977). *See Paschal v. Wainwright*, 738 F.2d 1173, at 1175 (11th Cir. 1984) A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively. *Weaver,* 450 U.S. 24, 29 n. 12, 101 S.Ct. 960, 964 n. 12, 67 L.Ed.2d 17 (1981); *see Dobbert,* 432 U.S. 282, 293, 97 S.Ct.

[8] For a brief history of the ex post facto clauses, U.S. Const. Art. I, § 10, cl. and U.S. Const. Art. 1, § 9, cl. 3, *see* J. Nowak, R. Rotunda, & J. Young, Handbook on Constitutional law 434-36 (1978); *Warren v. United States Parole Comm'n,* 659 F.2d 183, 186-89 (D.C.Cir. 1981).

[9] Some support exists for the view that the framers intended the ex post facto prohibition to apply to civil as well as criminal laws. *See* Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post Facto Laws,* 14 U.Chi.L. Rev. 539 (1947). Modern courts have applied the ex post facto clauses solely to criminal legislation. *Warren,* 659 F.2d at 187 n. 15; *see also, Harisiades v. Shaughnessy,* 342 U.S. 580, 594-95, 72 S.Ct. 512, 521-22, 96 L.Ed. 586 (1952).

2290, 2298, 53 L.Ed.2d 344 (1977) ("[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto.*"). *See also Thompson v. Missouri,* 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898); *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884).

[3] When subjecting a law to ex post facto scrutiny, courts should bear in mind the related aims of the ex post facto clause: providing fair notice of which acts will subject the perpetrator to criminal sanctions,[10] and preventing vindictive criminal legislation.[11] We are

[10] "Critical to relief under the *Ex Post Facto* clause is not an individual's right to less punishment, but the last of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver,* 450 U.S. at 30; 101 S.Ct. at 965.

> In a society committed to liberty and not governed by orthodoxy the presumption must be that acts not specifically prohibited are permitted. Such a presumption guarantees that the citizenry may feel secure in acting in reliance on existing law and assures that fair notice will be given of any change.

Warren, 659 F.2d at 188.

[11] "From the onset ... the ex post facto clauses have been understood to have been principally aimed at curtailing legislative abuses." *Warren,* 659 F.2d at 187. *See* The Federalist No. 44, at 351 (J. Madison); Note, *Ex Post Facto Limitations on Legislative Power,* 73 Mich.L.Rev. 1491 (1975). Justice Chase states that the ex post facto prohibition

> very probably arose from the knowledge, that the parliament of Great Britian claimed and exercised a power to pass such laws ... The acts were legislative judgments; and an exercise of judicial power ... With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such and similar acts of violence and injustice, I believe, the federal and state legislatures were prohibited from passing any ... *ex post facto* law.

Calder v. Bull, 3 U.S. (3Dall.) 386, 389, 1 L.Ed. 648 (1798) (citing notorious ex post facto legislation passed by the British Parliament).

guided by these principles as we determine whether petitioner has presented an ex post facto violation.

The second characteristic of an ex post facto law is concededly present in this case; the guidelines applied retrospectively to petitioner. The first and third characteristics are not present, however; the guidelines neither worked to petitioner's detriment nor constituted a criminal or penal law.

The federal sentencing statute under which petitioner received his modified sentence, 18 U.S.C. § 4205(b)(2) (1982), was enacted as a "medical model" sentencing provision.[12] The sentencer was to utilize the fully indeterminate prison term, prescribed by the statute, primarily for the purpose of rehabilitating the defendant; the parole commission, as "doctor," would monitor the defendant's response to treatment, decide when he was cured, and then release him.[13]

In 1976, the Congress, having grown dissatisfied with this medical model sentencing scheme for several reasons, passed the Parole Commission and

[12] In addition to 18 U.S.C. § 4205(b)(2) (1982), examples of "pure" medical model federal sentencing statues include the Narcotic Addicts Act, 18 U.S.C. §§ 4251-55 (1982); The Federal Youth Corrections Act, 18 U.S.C. §§ 5005-26 (1982); and the Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42 (1982). These statutes were fashioned primarily to serve the purpose of rehabilitation. 18 U.S.C. § 4205(a), (b)(1) (1982), sentences which are partially indeterminate in that they set a minimum time the offender must remain in prison before becoming eligible for parole consideration, might be said to serve the purposes of punishment and general and specific deterrence as well as that of rehabilitation.

[13] As the Supreme Court noted in *Williams v. New York*, 337 U.S. 241, 248, 69 S.Ct. 1079, 1083-84, 93 L.Ed. 1337 (1949), in commenting on the then role of the U.S. parole board, "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

Reorganization Act (the Parole Act or Act).[14] The Act reconstituted the parole authority as the U.S. Parole Commission, abolished the parole authority's "doctor" role, and gave it the new role of resentencer. Henceforth, the Commission, acting on essentially the same information presented to the sentencing judge,[15] would resentence the defendant for the purposes of punishment, general deterrence and specific deterrence. Rehabilitation would not be one of the Commission's resentencing objectives; any rehabilitation an offender might obtain would be a coincidental result of his incarceration.

The parole Act instructed the Commission to carry out a "national parole policy" and to promulgate guidelines to aid it in making parole decisions. 18 U.S.C. § 4203(a)(1) (1982). Following this directive, the Commission promulgated guidelines for the announced purpose of promoting "a more consistent exercise of

[14] Act of Mar. 15, 1976, Pub.L. No. 94-233, 1976 U.S. Code Cong. & Ad.News (90 Stat.) 219 (codified in various sections of 18 U.S.C. (1976)). The primary text of the Parole Reorganization Act begins at 18 U.S.C. § 4202 (1982).

[15] In fact, the Commission acts on a range of information greater than that considered by the sentencing judge. *See United States ex rel. Goldberg v. Warden*, 622 F.2d 60, 84 (3d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 210, 66 L.Ed.2d 91 (1980). The Commission may consider:

> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
> (3) presentence investigation reports;
> (4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and
> (5) reports of physical, mental, or psychiatric examination of the offender (and) ... (s)uch additional relevant information concerning the prisoner ... as may be reasonably available.

18 U.S.C. § 4207 (1982).

discretion, and enabling fairer and more equitable decision-making without removing individual case consideration." 28 C.F.R. § 2.20 (1979).

The Act requires the Commission, in deciding whether to grant parole, to consider "the nature and circumstances of the [prisoner's] offense and the history and characteristics of the prisoner" and its guidelines. 18 U.S.C. § 4206(a) (1982). The Commission's guidelines speak to "the nature and circumstances of the [prisoner's] offense" by classifying it in terms of severity, and to "the history and characteristics of the prisoner" by looking to his prior criminal record, drug dependence and other "salient factors" that are presumed to indicate whether he will be a good parole risk. The Commission is bound to follow these guidelines unless there is "good cause" for not doing so. 18 U.S.C. § 4206(c) (1982).[16]

The Act cautions the Commission not to parole a prisoner if he has not "substantially observed the rules of

[16] The regulation that promulgated the guidelines, 28 C.F.R. § 2.20(c), (d), (e) (1979), indicated the breadth of the Commissioner's discretion depart therefrom with the following language:

> (c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.
>
> (d) The guidelines contain examples of offense behaviors ... However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.
>
> (e) An evaluative sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

The Commission intended that the guidelines aid it in achieving a uniform system of parole, while retaining enough flexibility in the parole decision-making process to permit justice in each individual case.

the institution or institutions to which he has been confined," if his "release would ... depreciate the seriousness of his offense or promote disrespect for the law," or if his "release would ... jeopardize the public welfare." 18 U.S.C. § 4206(a) (1982). With this sentencing parole scheme in mind, we turn to the two ex post facto issues we must resolve: first, whether the Commission, in amending its guidelines to upgrade the severity rating of petitioner's offense from "Very High" to "Greatest II," increased his punishment; second, whether the guidelines are "laws."

A.

[4] The ex post facto clause operates to ensure that a citizen's fair notice as to what acts are criminal will not be changed after the citizen acts in reliance on that notice. When petitioner conspired to import cocaine into the United States he was on notice of the prison sentence he could receive if convicted, the portion of that sentence he would have to serve before he would be eligible for parole, and the extent to which his period of incarceration could be reduced through gain time. *See, e.g., Weaver v. Graham,* 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). Specifically, petitioner was on notice that, if he received the eight-year fully indeterminate sentence the court imposed, the Commission would have the discretion to parole him at any time, unless it determined *at the time it considered him for parole* that his release would "depreciate the seriousness of his offense or promote disrespect for the law" or would "jeopardize public welfare." Petitioner was also on notice that, in considering him for release, the Commission had to follow its guidelines unless "good cause" indicated otherwise.

[5] Petitioner's claim that the Commission could not amend the guidelines retrospectively if the amendment

would produce a longer term of incarceration implies that he was not on notice, when he committed his crime, that such an amendment could occur. In truth, petitioner was on notice that such an amendment might well occur. The Commission had a statutory duty to monitor and periodically update its guidelines and to apply current guidelines to crimes previously committed.[17] *See, e.g.*, H.Conf.Rep. No. 838, 94th Cong.2d Sess. 25, *reprinted in* 1976 U.S. Code Cong. & Ad.News, 335, 358-59 (in determining release Commission "shall be congnizant of the public perception of and respect for the law.") In the situation before us, the Commission determined that the street value of the narcotics an offender possessed did not reflect upon the seriousness of his drug offense as much as did the purity of the narcotics and his managerial interest in them. When he committed his crime, petitioner knew that the Commission, prior to his parole hearing, might make such a judgment call and thus lengthen any period of confinement he might have to serve. Petitioner knew, or should have known, that the role he played in his smuggling operation and the purity of the drugs involved were highly relevant to two important questions the Commission would have to decide in considering him for parole: whether his release would (1) depreciate the seriousness of his offense or promote disrespect for law and (2) jeopardize the public welfare.

Six U.S. Courts of Appeals and one U.S. Supreme Court Justice have entertained claims similar to petitioner's and have held that retrospective changes in

[17] Congress intended that the "Parole Commission ... continue to refine both the criteria which are used[in parole decision making] and the means for obtaining the information used ...." H.R.Rep. No. 94-838, 94th Cong. 1st Sess. at 25-26, reprinted in 1976 U.S.Code Cong. & Ad.News 358-59. For example, "[t]he Parole Commission shall actively seek the counsel and comment of the corrections and criminal justice communications prior to promulgation of guidelines and shall be cognizant of past criticism of parole decision making." *Id.* at 359.

parole guidelines do not aggravate the punishment provided for a crime. *See Portley v. Grossman*, 444 U.S. 1311, 100 S.Ct. 714, 62 L.Ed.2d 723 (1980) (Rehnquist, J., circuit justice; motion for stay); *Warren v. United States Parole Commission*, 659 F.2d 183 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1454, 71 L.Ed.2d 665 (1982); *Hayward v. United States Parole Commission*, 659 F.2d 857 (8th Cir. 1981), *cert. denied*, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 454 (1982); *Rifai v. United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Shepard v. Taylor*, 556 F.2d 648 (2d Cir.1977); *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977).[18] In *Portley*, a re-parole cause, Justice Rehnquist sitting as a circuit justice, held that changes in parole guidelines do not add punishment retrospectively. He noted that the ex post facto clause does not extend to every change which may work to a defendant's disadvantage and does not limit changes in procedure which do not affect substantive rights. 444 U.S. at 1312, 100 S.Ct. at 715 (citing *Dobbert*, 432 U.S. at 293, 97 S.Ct. at 2298). Because of the discretion retained by the Commission, Justice Rehnquist held that the guideline amendments were merely procedural, no pre-existing right was impaired, and the offender's

[18] Petitioner contends that *Portley* and *Warren* are inapposite because they deal with reparole. The analysis of the guidelines under the ex post facto clause remains the same and the logic of those decisions extends beyond the individual factual settings. Necessary to the ultimate conclusion in each of those cases, that the promulgation or amendment of parole guidelines was not the creation of an ex post facto law, was the intermediate conclusion that the guidelines did not affect the prisoner's eligibility for parole. A repeat or reduction of parole eligibility could violate the ex post facto clause, however. *See Weaver*, 450 U.S. at 33, 101 S.Ct. at 967.

punishment was not enhanced. *Id.* at 1312-13, 100 S.Ct. at 714-15.[19]

[6] In sum, the commission's decision in this case implicated neither of the principal policies served by the ex post facto clause, to ensure that the offender is not singled out as the target of legislature retribution and that he is provided fair notice of the punishment that may be meted out if he transgresses the criminal law.

B.

[7] As the district court concluded, the Commission's guidelines are, simply, guidelines. They are not promulgated by any legislature. Rather, they are stated policy rules that show how agency discretion is likely to be exercised.[20] They do not state rules of conduct for the public. A change in the guidelines does not affect the maximum or minimum prison sentence a court may impose, the point at which the prisoner becomes eligible

[19]Petitioner claims that relief is required by *Weaver*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). *Weaver* dealt with an ex post facto challenge to a statute which retrospectively limited statutory prison "gain time." *Weaver* applies to this case for the principles it adds to ex post facto analysis, not for its specific holding. See our discussion of *Weaver* in a similar context, *Paschal v. Wainwright*, at 1173 (11th Cir. 1984). Petitioner also urges this court to adopt the Third Circuit's reasoning in *United States ex rel. Forman v. McCall*, 709 F.2d 852 (3d Cir. 1983) (guidelines, if applied inflexibly, could violate ex post facto clause). We have noted previously that *Forman* has been soundly rejected by federal courts which have considered the issue, *Paschal*, at 1180, n. 12, and this court has rejected it as not persuasive. *See id.* at 1180-81.

[20] We are not persuaded that the guidelines constitute "laws" under the ex post facto clause merely because they could come under the rulemaking provisions of the Administrative Procedures Act. *See, e.g., Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C.Cir.1974) (promulgation of guidelines before Parole Reorganization Act subject to Administrative Procedures Act).

(3)

No. 84-1522

FILED

JUL 2 1985

ALEXANDER

In the Supreme Court of the United States

OCTOBER TERM, 1984

DOUGLAS CHARLES DUFRESNE, PETITIONER

v.

BENJAMIN BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the application to him of parole guidelines amended after he committed his offense violates the Ex Post Facto Clause of the Constitution, Art. I, § 9, Cl. 3.

1. Petitioner formerly was a senior pilot for Pan American Airlines. On September 17, 1979, he pleaded guilty in the United States District Court for the Western District of Texas to one count of conspiracy to import cocaine, in violation of 21 U.S.C. 952. In exchange, one count charging conspiracy to import opium, in violation of 21 U.S.C. 952, and one count charging possession with intent to distribute opium, in violation of 21 U.S.C. 841, were dismissed. Petitioner was sentenced to a term of imprisonment of eight years.

The conduct on which the indictment was based occurred between March 1978 and March 1979. Following his initial parole hearing on March 21, 1980 at the Federal Prison Camp, Eglin Air Force Base, Florida (R. 42), petitioner was originally informed by the United States Parole Commission that he would be released after serving 52 months of his prison sentence. The Parole Commission set the release date in accordance with parole guidelines that went into effect on June 4, 1979. 44 Fed. Reg. 26540-26548 (1979). Under those guidelines, petitioner's offense was categorized as a "Greatest I" offense, because it involved the equivalent of 260 grams of pure heroin and because petitioner had a managerial interest in the drugs (Pet. App. 2). The guidelines provided for a range of imprisonment of between 40 and 52 months prior to release (*id.* at 25). Petitioner's presumptive release date subsequently was accelerated by six months, so that he would serve 46 months prior to parole (*id.* at 26 n.6).

After exhausting his administrative remedies, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida on August 24, 1982. He contended that the Parole Commission's use of the parole guidelines in effect on the date of his parole hearing, rather than those in effect on the date the offense was committed, violated the Ex Post Facto Clause of the Constitution. The guidelines in effect when petitioner committed the offense (28 C.F.R. 2.20 (1978)) graded the severity of a drug offense according to the street value of the drugs, while the guidelines that went into effect on June 4, 1979 ranked the seriousness of drug trafficking offenses according to the weight and purity of the drugs and the interest the defendant had in them. Petitioner argued that under the former guidelines, he would have been released on parole after serving 26 to 36 months in prison, because the offense involved less than $100,000 worth of drugs. Pet.

App. 26-27. The magistrate rejected the Parole Commission's determination that the street value of the opium involved was more than $100,000 and that petitioner's offense severity therefore would have been essentially the same even under the 1977 parole guidelines (*id.* at 3-5). The magistrate also accepted petitioner's ex post facto argument and directed the Commission to reestablish petitioner's release date under the 1977 guidelines that designated petitioner's offense severity in a lower category, which provided for a range of imprisonment of between 26 to 36 months (*id.* at 5).

The district court reversed (Pet. App. 7-17). It concluded that parole guideline changes constitute procedural changes permissible under the Ex Post Facto Clause, rather than substantive changes in parole eligibility, and that the new guidelines therefore could be applied in calculating petitioner's eligibility date (*id.* at 14-15). The district court also reversed the magistrate's finding that the street value of the drugs involved in the offenses was less than $100,000, and the court therefore found no ex post facto violation for this additional reason as well (*id.* at 16-17).

The court of appeals affirmed, holding that the Ex Post Facto Clause did not bar the Commission from considering petitioner for release under its revised guidelines (Pet. App. 20-37). The court explained that the revision of the guidelines did not implicate the purpose of the Clause to ensure that citizens will receive fair notice of criminal sanctions, because petitioner was on notice when he committed the offenses that his release would be committed to the discretion of the Commission and that the Commission could revise its guidelines in light of experience (*id.* at 32-35, 37). The court further explained that the amendment of the guidelines also did not present the additional concern to which the Ex Post Facto Clause is addressed—vindictive action by the legislature—because the guidelines are revised

not by Congress, but by the Commission, and because they do not affect the maximum or minimum sentence, the prisoner's eligibility for parole, or his mandatory release based on good time credits (*id.* at 35-37).

2. The court of appeals correctly rejected petitioner's ex post facto claim, and its decision does not conflict with any holding by this Court or by another court of appeals. That decision does not warrant review for a number of reasons.

a. First, we have been informed by the Parole Commission that petitioner is currently incarcerated[1] and is scheduled to be released on parole on July 11, 1985. Petitioner's contention that he should be released at an earlier date under the guidelines in effect in March 1979 therefore would be moot by the time the Court ruled on that contention.

b. Second, the result would be no different in this case irrespective of which set of parole guidelines is applied. As the district court found (Pet. App. 16-17), and as we argued on appeal (Br. 17-19), the street value of the drugs involved was more than $100,000. For this reason, the guidelines in effect at the time of the offense indicated a range of from 40 to 55 months' incarceration prior to release, while the guidelines in effect at the time of petitioner's initial parole hearing recommended a period of incarceration of 40 to 52 months. The guideline revision therefore had no adverse effect on petitioner.

c. In any event, as the court of appeals correctly held, use of parole guidelines in effect at the time a parole decision is made, rather than those in effect when the offense was

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[1]Petitioner states (Pet. 12-13) that he was released on bail pending appeal on September 17, 1982, and that he remained on bail after that date until the filing of the petition. However, we have been informed by the Parole Commission that petitioner was incarcerated from August 17, 1983 to February 2, 1984, and again from March 4, 1985 to the present time.

committed, does not violate the Ex Post Facto Clause. That Clause provides that "No Bill of Attainder or ex post facto Law shall be passed." Only Congress can "pass" a "Law." U.S. Const. Art. I, § 7; *INS* v. *Chadha,* 462 U.S. 919 (1983). It thus is clear that the Ex Post Facto Clause is addressed to actions of the legislature, not actions of an Executive agency, such as the Parole Commission, taken pursuant to a duly enacted law. See *Weaver* v. *Graham,* 450 U.S. 24, 28 (1981) (the Clause "forbids the Congress * * * to enact any law * * *" that enhances the punishment for an offense previously committed). In this case, the relevant statutory provision, 18 U.S.C. 4206(a), was enacted in 1976, and has not been amended since that time.[2] There accordingly has been no "Law" "passed" by Congress since petitioner committed the offenses in question in 1978 and 1979 that has affected the criteria for his release on parole.[3]

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[2]The existing statutory provisions governing parole were repealed, effective November 1, 1986, by Sections 218(a)(5) and 235 of the Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027, 2031. However, under Section 235(b)(1) of that Act (98 Stat. 2032), the parole provisions will remain in effect for five additional years as to any individual convicted prior to that date.

[3]In *Prater* v. *United States Parole Commission,* No. 84-1121 (June 12, 1985), the Seventh Circuit considered an ex post facto claim in a case in which the prisoner had committed the offense prior to Congress's amendment of the statutory provisions in 1976. A divided panel remanded for further proceedings to determine whether the 1976 amendments altered the administrative practice concerning the granting of parole in a way that disadvantaged the particular prisoner. Slip op. 14-18. *Prater* has no bearing on the instant case, however, because petitioner committed the offenses in question after the 1976 statutory amendments. Indeed, the Seventh Circuit in *Prater* expressly distinguished decisions of other courts of appeals (including the Eleventh Circuit's decision in the instant case) that had rejected ex post facto claims based on the guidelines (slip op. 7), observing that the Seventh Circuit itself appeared to have adopted a similar view regarding the guidelines in *Zeidman* v. *United States Parole Commission,* 593 F.2d 806, 807 (1979).

The Parole Commission's guidelines were revised in 1979, but those amendments of administrative standards did not implicate ex post facto concerns. In 18 U.S.C. 4206, Congress granted the Executive broad discretion in granting parole, just as criminal statutes traditionally have granted the judiciary broad discretion with regard to sentencing. A change in the guidelines that assist the Commission in the exercise of its discretion—reflecting its accumulated experience in applying the statutory criteria or a change in its view of the appropriate balancing of those criteria—therefore no more violates the Ex Post Facto Clause than would an increase in the average sentence imposed by the judiciary as a result of experience or a change in sentencing philosophy of individual judges. In such circumstances, the Parole Commission or courts would have taken action pursuant to laws passed by Congress that themselves remained unchanged, but gave individuals fair warning that the length of their sentences and release on parole would be committed to the broad discretion of the Judicial and Executive Branches. The courts of appeals therefore have generally rejected ex post facto claims premised on the impact of administrative parole guidelines. See *DiNapoli* v. *Northeast Regional Parole Commission,* No. 85-2054 (2d Cir. June 13, 1985); *Paschal* v. *Wainwright,* 738 F.2d 1173, 1180-1181 (11th Cir. 1984); *Roth* v. *United States Parole Commission,* 724 F.2d 836, 840 (9th Cir. 1984); *Artez* v. *Mulcrone,* 673 F.2d 1169, 1171 (10th Cir. 1982); *Warren* v. *United States Parole Commission,* 659 F.2d 183, 195-196 (D.C. Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Hayward* v. *United States Parole Commission,* 659 F.2d 857, 862 (8th Cir. 1981), cert. denied, 456 U.S. 935 (1982); *Rifai* v. *United States Parole Commission,* 586 F.2d 695 (9th Cir. 1978); *Shepard* v. *Taylor,* 556 F.2d 648 (2d Cir. 1977); *Ruip* v. *United States,* 555 F.2d 1331 (6th Cir. 1977). See also *Portley* v. *Grossman,* 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice).

Petitioner contends (Pet. 8), however, that the Third, Eighth, and District of Columbia Circuits have taken a contrary view. This contention is without merit. The District of Columbia Circuit decision upon which petitioner relies (Pet. 8 n.13), *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (1974), did not involve an ex post facto issue; the court there held only that the Commission must follow the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553, when promulgating its guidelines. When later presented with the issue, the District of Columbia Circuit in fact rejected an ex post facto claim in *Warren* v. *United States Parole Commission, supra.* In *Richardson* v. *United States Parole Commission*, 729 F.2d 1154, 1155 (1984), the Eighth Circuit decision upon which petitioner relies (Pet. 8 n.13), the court declined to consider the ex post facto claim because the prisoner could not show that he would have received a more favorable determination under the prior guidelines. Furthermore, in *Hayward* v. *United States Parole Commission, supra*, the Eighth Circuit rejected an ex post facto claim where the prisoner had committed the offense before the guidelines were instituted, because the prisoner had no expectation of any particular parole system at that time. 659 F.2d at 862.

Finally, petitioner relies (Pet. 8 n.13, 11) on the Third Circuit's decision in *Geraghty* v. *United States Parole Commission*, 579 F.2d 238 (1978), vacated and remanded on other grounds, 445 U.S. 388 (1980). However, in *Geraghty*, the Third Circuit did not hold that application of revised parole guidelines violated the Ex Post Facto Clause; it instead remanded for a factual determination regarding the role of discretion in parole decisions, so that it could determine whether the parole guidelines should be treated as "laws" for purposes of ex post facto analysis. See 579 F.2d at 266-267. The Third Circuit subsequently followed the same course in *United States ex rel. Forman* v. *McCall*,

709 F.2d 852, 862 (1983). Thus, contrary to petitioner's assertion, the Third Circuit has not held that the Commission's application of revised guidelines that result in a longer period of incarceration prior to release on parole violates the Ex Post Facto Clause.[4] This Court has denied certiorari in other cases in which the petitioner asserted a conflict with the Third's Circuit's decisions in *Geraghty* and *Forman*. See *Gregorio* v. *United States Parole Commission*, cert. denied, No. 83-5699 (Feb. 21, 1984); *Walker* v. *United States Parole Commission*, cert. denied, No. 83-6237 (June 11, 1984); *Hood* v. *United States Parole Commission*, cert. denied, No. 83-6263 (June 11, 1984). There is no reason for a different result here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JULY 1985

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[4]In *United States* v. *Ferri*, 652 F.2d 325 (3d Cir. 1981), upon which petitioner also relies (Pet. 8 n.13), the Third Circuit also remanded without resolving the ex post facto issue.

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for parole or his mandatory release date on good time.[21] *Accord, Portley v. Grossman,* 444 U.S. 1311, 1312-13, 100 S.Ct. 714, 715, 62 L.Ed.2d 723 (1980). The guidelines merely indicate when, in most cases, the prisoner can expect release. We agree with the second, sixth, seventh, and ninth circuits that the parole guidelines do not have the force and effect of law. *Ziedman v. United States Parole Commission,* 593 F.2d 806 (7th Cir. 1979); *Rifai v. United States Parole Commission,* 586 F.2d 695 (9th Cir. 1978); *Shepard v. Taylor,* 556 F.2d 648 (2d Cir. 1977); *Ruip v. United States,* 555 F.2d 1331 (6th Cir. 1977); *accord, Joost v. United States Parole Commission,* 535 F.Supp. 71 (D. Kan. 1982): *Kirby v. United States,* 463 F.Supp. 703 (D.Minn.), *vacated on other grounds,* 600 F.2d 146 (8th Cir. 1979); *Wilson v. United States Parole Commission,* 460 F.Supp. 73 (D.Minn. 1978). As the Sixth Circuit stated:

> [W]hat is involved in this case is not agency interpretation of law but an agency's setting up guidelines for itself to assure the uniform execution of its business. These guidelines are not law, but guideposts which assist the Parole Commission ... in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not filed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines.

[21] In this case we are not dealing with curtailed parole *eligibility.* Thus, *United States ex rel. Graham v. United States Parole Commission,* 629 F.2d 1040 (5th Cir.1980), is inapposite and does not support petitioner's case. *Graham* addressed a parole regulation, 28 C.F.R. § 2.14(a) (1978), not in issue here. The *Graham* court of appeals remanded the case to the district court and stated that the regulation could be an ex post facto law if it substantially diminished or eliminated the prisoner's eligibility for parole. 629 F.2d at 1044. The parole guidelines at issue here did not affect petitioner's parole eligibility. Parole eligibility is determined by the sentence imposed by the trial court.

Ruip,555 F.2d at 1335.

[8-10] Even a showing that the Commission adhered to the guidelines in the vast majority of cases[22] would not necessarily prove that the guidelines were law; otherwise, every policy that an agency adhered to consistently would become a law from which the agency could not vary. *Accord, Rifai,* 586 F.2d at 698. Congress intended that the Commission periodically amend the guidelines to reflect contemporary views concerning the seriousness of given crimes and parole recidivism. *E.g.*, S.Rep. No. 369, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S.Code Cong. & Ad. News 335. Such amendments are not indicative of provisions which have the force and effect of law. As the legislative history shows, "[t]he standards for release on parole [in the Parole Act] ... are not changed from [prior] law." *Id.* at 339. The Commission may follow its guidelines, disregard them, or change them. Parole remains an act of discretion. *See, e.g., Shahid v. Crawford,* 599 F.2d 666, 669 (5th Cir.1979); *Brown v. Lundgren,* 528 F.2d 1050, 1055 (5th Cir.), *cert. denied,* 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283 (1976).

Because the guidelines in question are not criminal laws and their amendment did not add to the punishment prescribed for petitioner's crime, petitioner has failed to establish two of the requisite elements of an ex post facto claim. Accordingly, the judgment of the district court denying his claim is

AFFIRMED.

[22] The Commission may deviate from the guidelines for "good cause." 18 U.S.C. § 4206(c) (1982).